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Legal Challenges to Freedom of the Press in the Americas

JAIRO E. LANAO*

I. INTRODUCTION

This article will address the issue of how the free flow of information is obstructed by the existence of numerous laws in the majority of civil law countries¹ in the Western Hemisphere. It will also address the common treatment that most of these countries share with regard to the legal schemes that govern press freedom and the exercise of journalism.² This article will examine the major pitfalls of the substantive and procedural laws that affect the newsgathering ability of the print media and their ability to publish information without major restraints. It will also consider other factors that are critical to press freedom, such as the role of the judiciary branch.

This legal analysis does not purport to reveal whether there is press freedom in the studied countries. Rather, it is an illustration of the way statutory schemes are laid out in those countries. The reader may then make certain inferences from the description of the local laws, the extent the laws affect the freedom of the media to report, and the legal constraints these laws place on journalists.

Encompassing two years of research, the study included input from media law experts from all the twenty-four countries³ examined who were interviewed using a lengthy survey on twenty-two points of the law. Each survey contained all relevant provisions of the laws affecting press freedom and the free exercise of journalism. The survey of each country included a range of questions dealing with the most general con-

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1. See generally BUTTERWORTH'S ENGLISH/SPANISH LEGAL DICTIONARY (1991) (defining "civil law" as "legal systems based directly or indirectly on Roman Law. It is the legal systems prevalent in Continental Europe and those of Latin America."). See also WEST'S SPANISH-ENGLISH/ENGLISH-SPANISH LAW DICTIONARY (1992) (defining "civil law" as a legal system based on codes of law rather than court decisions or legal precedents).

2. See generally JAIRO E. LANAO, FREEDOM OF THE PRESS AND THE LAW (1999).

3. See *id.* The study included: Argentina; Bolivia; Brazil; Canada; Chile; Colombia; Costa Rica; Cuba; Dominican Republic; Ecuador; El Salvador; Guatemala; Haiti; Honduras; Jamaica; Mexico; Nicaragua; Panama; Paraguay; Peru; Puerto Rico; United States; Uruguay; and Venezuela.

stitutional provision to the more specific regulation of content. Twenty-three of the countries were visited to obtain the more recent legislation, as well as treatises on the subject matter.

At the time the study began, there was no extensive information compiled on all the laws affecting freedom of the press and the free exercise of journalism around the Western hemisphere. In particular, there were few books that focused on press freedom in Latin American.

II. COMMON RESTRICTIONS TO FREE PRESS IN THE AMERICAS

A. *Legal Restrictions*

Once the major laws affecting the free flow of information, the press, and the exercise of journalism of the twenty-four countries were compiled, several conclusions were evident regarding the press and the law.⁴ Criminal libel law and its close relative, the insult law, are the most frequently utilized to attack the press. The use of these laws results in detentions of journalists, assessment of excessive damages, and the threat of potential jail time for such infractions. Other legal institutions such as the right of reply, prior restraints, and judicial bans on access to court records and public information are other causes of obstruction of the press.

At first glance, problems arise from the poorly crafted laws enacted, in some cases several decades ago, to establish a regulatory scheme of the press.⁵ The press is confronted with an extensive array of laws that essentially criminally punish journalists and media outlets for the publication of information. The former and, consequently, the latter are faced with the apprehension of being prosecuted by laws that, in many instances, appear to be ambiguous and all-inclusive.⁶ The content

4. *See id.*

5. *See id.* Some of the laws devised to regulate the press were enacted more than fifty years ago or enacted during military or dictatorship regimes with very limited views of the press. Others simply do not reflect a modern approach of the media. *See, e.g.*, Press Law of 1925 (Bol.); Press Law of 1967 (Braz.) (enacted during a military government); Press Law of 1944 (Colom.); Press Law of 1962 (Dom. Rep.) (enacted during the Trujillo era); Press Law of 1975 (Ecuador); Press Law of 1950 (El Sal.); Press Law of 1966 (Guat.); Press Law of 1885 (1986) (Haiti) (modified during the Duvalier era); Press Law of 1958 (Hond.); Press Law of 1917 (Mex.); Press Law of 1978 (Pan.) (enacted during a military government).

6. It is not uncommon to find statutes in any field of law in the civil law scheme that are broad, confusing, or ambiguous. Apparently, these flaws are built into the statutory system whereby, due to the lack of broad judicial review, the legislative branch attempts to exhaust the subject matter when drafting laws. This is based on an understanding the limited authority of judges to create legal standards or set mandatory case precedents in the interpretation and application of the law. Notwithstanding, today in some cases, courts, such as the Colombian Constitutional Court or the Argentine Supreme Court, are less tied down to the literal meaning of the law. Because there is no *stare decisis* in judicial decisions in a civil law context, judges are forced to decide the outcomes, not based on the similarity of the facts and prior decisions, but

of speech is frequently regulated for governmental interests. Both the journalism profession and the activity of the press is the object of regulations. These limiting laws are found in a variety of statutes such as criminal codes, press laws, sanitation and health codes, advertisement laws, consumer protection statutes, and other laws of these countries.⁷

As a result, the press faces prior censorship and prohibitions on publications. On many occasions, journalists are frequently haled into criminal courts and are forced to make personal appearances and hire legal representation. Despite this great burden on the press, most journalists in these cases are not convicted.⁸

Access to criminal court records is not permitted because of the secrecy in criminal investigations required by most, if not all, Latin American countries.⁹ Restraints, however, exist in common law jurisdictions as well.¹⁰ For example, access to criminal court proceedings is frequently denied and public record laws are nonexistent in Latin America. While some laws require licensing of the press, other laws

rather by examining and applying the textual meaning of the law. All this adds rigidity to the system.

7. See generally LANAÓ, *supra* note 2. Laws that regulate the press and journalism can be found in the following sources: constitutions; press laws; codes of substantive criminal law and criminal procedure; telecommunications laws; codes of youth offenders; advertisement laws; commercial and civil codes; health and sanitation codes; electoral statutes; consumer defense statutes; codes of military justice; intellectual property and copyright laws; administrative codes; child protection statutes; and international laws.

8. There are several reasons for not having a full criminal trial or a final conviction in these types of cases. First, in some Latin American jurisdictions, criminal libel is a crime requiring a complaint by the aggrieved party before the prosecutors and the party who must be an active part of the process until the end of the trial. Since the alleged libel cannot be officially investigated at the complaint stage, many complainants rarely persevere until the trial stage. Another explanation may be found in the precarious justice systems prevalent in Latin America.

9. See, e.g., Cód. PROC. PEN. art. 331 (Colom.) (establishing confidentiality of the investigative stage of legal proceedings); Law on Abuse of Advertising, art. 25 (1967) (Chile) (empowering judges to ban reporting of certain trials under their jurisdiction). These prior restraints are justified on grounds that such reporting could jeopardize the success of the legal process, offend good behavior, or disrupt state security or public order. See also Cód. PROC. PEN. art. 73 (Peru) (assigning a confidential classification to the instruction or preliminary discovery phase in criminal cases). Under this rule, a judge may order that an action be kept confidential for a determined period of time if it is determined that disclosure could hamper the investigation or its outcome.

10. See generally Criminal Code, R.S.C., ch. C-34, § 300 (2002) (Can.) (criminalizing the publication of libel known to be false); Criminal Code, R.S.C., ch. C-46, § 517 (2002) (Can.) (enabling judges to discretionally ban publications regarding several phases of criminal proceedings); Criminal Code, R.S.C., ch. C-46, § 539 (2002) (Can.) (preliminary hearings); Criminal Code, R.S.C., ch. C-46, § 542 (2002) (Can.) (confessions during the preliminary hearings); Criminal Code, R.S.C., ch. C-46, § 486(3) (2002) (Can.) (names of victims and witnesses under eighteen in a sexual assault trial); Criminal Code, R.S.C., ch. C-46, § 648, (2002) (Can.) (voir dire evidence in jury trials); Criminal Code, R.S.C., ch. C-46, § 649 (2002) (Can.) (jury deliberations).

impose access by requiring forced publications.¹¹

Latin American framers have commonly prohibited censorship in their constitutions, yet have included concepts that place conditions on freedom of expression. Chile's constitution states, "Freedom of expression is guaranteed but subject to subsequent punishment for the crimes committed."¹² Some constitutions imply that freedom of expression and the press are subordinated to other fundamental rights.¹³ Some countries

11. See generally the right of reply in Argentina, Brazil, Bolivia, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Panama, Paraguay, Uruguay, and Venezuela. Note that some countries have established mandatory retraction or correction statutes that have the same application of the right of reply.

12. See CHILE CONST. art. 19, cl. 4 (ensuring to all persons the respect and protection of a private and public life and to the honor of the person and their family). Violation of this article, committed via a medium or communication and consisting of a false act or fact, or causing unjustified harm or discredit to a person or family, constitutes a crime and shall be punished in accordance with the law. *Id.* See also COSTA RICA CONST. art. 29 (1949) (establishing that all individuals may communicate their thoughts in writing without any fear of censorship except for criminal responsibility for abuse of this right and crimes against honor); EL SAL. CONST. art. 6 (1982) (establishing similar conditional rights); HAITI CONST. art. 28.3 (providing that any press offense or abuse of the right of expression be subject to the Criminal Code); MEX. CONST. art. 6 (stating that the manifestation of ideas shall not be subject to any judicial or administrative inquiry, except in the case of offense against morality or right of others, incitement to crime or disruption of public order and that the right to information is guaranteed by the state); PERU CONST. art. 2, § 4 (1993) (providing that the crimes committed by means of books, the press, and other communications media are covered by the Penal Code and are judged by the general courts).

13. See BRAZ. CONST. art. 5, § 10 (seems to subordinate freedom of expression and of the press to intimacy, privacy, the good name and the image of persons). COLOMBIA: The 1991 Colombia Constitution provided expressly for the right to privacy in article 15 and contains additional provisions dealing with this right. See COLOM. CONST. art. 21 (good reputation); *id.* art. 28 (individual freedom). A ruling handed down in 1992 by the Constitutional Court concluded that in cases of conflict between the right to privacy and the right to information, the right to privacy prevails because it is a necessary consequence of human dignity having been consecrated as a fundamental principle and essential value. The right to privacy may be limited only to safeguard genuine general interest as proclaimed in the Constitution. Colom. Const. Ct. J. T-414 (1992). DOMINICAN REPUBLIC: Article 8, paragraph 6 of the Constitution of the Dominican Republic declares: "Every person, without prior censorship, may freely express his ideas in writing or any other form of expression, graphic or verbal. The law will impose sanctions when the ideas expressed threaten the dignity and the morals of the people, the public order or the good customs of society." GUATEMALA: Article 35 of the Political Constitution of the Republic, in effect since 1986, stipulates that: "The expression of thought is free regardless of media, without censorship or prior license. This constitutional right cannot be restricted by law or any governmental disposition. Whoever, making use of this freedom, is disrespectful of privacy or morality, shall be responsible in accordance to the law." The Press Law of 1966 (Guat.) establishes in articles 28, 31, 32, 33, 34, and 35 the following in pertinent part: "In accordance with this law, the publications which abuse the freedom of expression of thought may result in trial by jury and sanctions in the following cases: . . . c) printed materials which injure morality; d) printed materials which are disrespectful of privacy; and e) printed materials which contain grave libels." MEXICO: article 7 of the 1917 Constitution states that: "The freedom to write and to publish writings on any matter is inviolable. No law or authority may impose prior censorship, require surety of authors or printers or restrict freedom to print beyond the limits of respect for privacy, morality and public peace." PARAGUAY: The rights to uphold reputation and to privacy are guaranteed in the National Constitution of 1992, in Article 33, On the Right to Privacy, which

have prohibited censorship, but place further restraints on press freedom by banning information that is contrary to good customs, decency, family values, and even national symbols.¹⁴ Moreover, the press in Latin America is hindered by the constant threat of laws that make it difficult to report as a watchdog on the governments and to report on matters of public interest.¹⁵

B. *Judicial Restrictions*

The judiciary also poses severe restraints on the press due to its preponderant role in adjudicating the numerous criminal offenses the press is faced with under Latin American legal schemes.¹⁶ This is aggravated due to the lack of independence of the judiciary and, in general, the crisis in most Latin American justice systems. Judges also have vast discretion in some cases in determining which trials may be covered by the news. In addition to citing the numerous criminal offenses journalists may be prosecuted for the dissemination of information, the study also cites several instances of broad judicial powers concerning the media that may lead to abuse. For example, under the 1925 Bolivian Press Law, there is a special system of justice for the offenses commit-

says: "Personal and family intimacy, and respect for privacy are inalienable. The conduct of persons, so long as it does not affect public order as established under the law or the rights of others, shall be exempt from public authority. The right to protection of privacy, dignity and reputation of persons is guaranteed." These rights by way of legal scholarly interpretation are meant to supersede the freedom of expression and of the press.

14. See Press Law of 1967 art. 11 (Braz.) (prohibits information that offends morality or good customs); HOND. CONST. art. 75 ("The law that regulates freedom of speech may establish prior censorship, in order to protect the ethical and cultural values of society, as well as the rights of people such as infants, adolescents and the youth").

15. See the country by country reports by the INTER AMERICAN PRESS ASSOCIATION, PRESS FREEDOM IN THE AMERICAS, 2001 ANNUAL REPORT (2001). See Argentina report on the misguided use of the defense of the fair report privilege (Campillay defense) at 18; see the Brazil report on the Gag Law bill that forbids the authorities to report to the press on matters that are being currently investigated by the police, justice and administrative personnel at 24; see the Chile report on the application of the State Security Law against journalists of *La Tercera* accused of attacking the decorum of a high ranking official at 44; see the Costa Rica report on the forced publication of a ten-page reply of a grievance against *La Nación* and the suspended sentence against a journalist under criminal libel at 57, 59; see the Ecuador report on the enactment of several anti-press bills at 73; see the El Salvador report on the application of several provisions of the Criminal Code of Procedure that enable judges to discretionally issue gag orders and close courtrooms to the public at 75; see the Paraguay report on the accusations before a criminal court of several newspaper directors and journalists for alleged violations of the electoral ban and defaming high officials at 110-112; see the Peru report on a court order to temporarily seize the presses of two opposing newspapers to the government at 115; see the Venezuela report on the criminal libel suits against several newspapers at 140.

16. See Press Law of 1967, art. 11 (Braz.) (prohibiting information that offends morality or good customs); HOND. CONST. art. 75 (allowing for prior censorship to protect the ethical and cultural values of society, as well as the rights of people such as infants, adolescents, and the youth).

ted by the media.¹⁷ The aforementioned press law brings a special structure of tribunals to judge the offenses committed through publications and by journalists. It also sets forth the duty of the jury to adjudge the press crimes; but criminal libel can be tried by the special tribunals or by the ordinary justice in the case of non-media defendants. Under the 1988 Brazilian Constitution, media defendants are punished by high moral damages (*this may be compared to punitive damages in the United States*) for committing the criminal offenses.¹⁸

The Colombian courts have passed important rulings with respect to media liability. In a September 1999 decision, the Colombian Supreme Court established a journalistic tort liability as a result of imparting inaccurate or libelous information going beyond any specific statute and applying strict liability standards. Though, it stated that it was in accordance with article 55 of Law 29 of 1944 the Colombian Press Law, it was viewed as an abuse of discretion.

On the other hand, the Constitutional Court has attempted to establish liability based on negligence for inaccurate information pursuant to duty of the press to divulge accurate information in accordance with Article 20 of the Colombian Constitution. It has been understood in Colombia that the right to information includes freedom of the press and that this freedom must be exercised accurately and impartially. To put it another way, the Constitutional Court, in indicating that there are two aspects to freedom of information, has declared, "This is, in principle, the freedom to inform – that is to impart the information, which in turn involves the freedom to receive the information."¹⁹ The court has reaffirmed that Article 20 of the Constitution imposes two limits or assumptions regarding the right to know: ". . . that news reports should reflect the truth and that they should show impartiality and balance."²⁰ The court further held that "The media must also perform a social role, which is to keep the public well informed about all the events or developments that occur in the daily life of the community. They must not distort the facts, because in that way society would not receive information, but rather disinformation about what has occurred."²¹ Although the Court has clarified the difference between accuracy and impartiality,²² saying that facts require accuracy and opinions require impartiality, it is

17. Press Law of 1925, art. 28 (Bol.).

18. BRAZ. CONST. art. 16, §§ II, IV. Moral damages are also available under the Press Law and the Brazilian criminal code. See, e.g., Press Law of 1967, art. 18 (Braz.). The civil code does not add any clarity. See CÓDIGO CIVIL art. 1547 (Braz.).

19. Colom. Const. Ct. J. 603 (Sept. 9, 1997).

20. Colom. Const. Ct. J. 603 (Oct. 27, 1992).

21. Colom. Const. Ct. J. 603 (Oct. 27, 1992).

22. Colom. Const. Ct. J. 080 (Feb. 26, 1993).

a matter of concern to see a number of legal actions being taken based on an interpretation of what is regarded as false information and what corresponds to the facts. It is important to stress that the same Court has said that protection of honor and good name limits the right to inform and that it is incumbent upon the media to protect these by ensuring that news reports are not based on false facts—truthful information; that the reporter in publishing the story be unaware it was false—impartial information; that the news medium having checked was able to show it was false—complete information; and that the information reflected the actual facts—accurate information.²³ The Court, in the same ruling, held that information is unbiased when the manner of its transmission or presentation is not slanted, tendentious or arbitrary. The foregoing indicates that perhaps the legal standard of scrutiny in gauging the truthfulness of a report and the due care on the part of the news medium or journalist is not being merely negligence, but being gross negligence or recklessness.

The Constitutional Court has indicated in its rulings that there are constitutional limits to freedom of expression and of information. The first of these limits is the duty of the media to publish information that is not inaccurate in particular when it has to do with the personal honor and good name of a person.²⁴ In addition, it has held that the limit implicit in these freedoms is personal honor and a good name. As already noted, the limit to the right of information is that of truthful information—that reports not be based on false facts; that the journalist be unaware of the falsity of the information—unbiased reporting; that the news medium would, with a minimum of checking, not have discovered the falsity—complete information; and that the information correspond exactly to the actual facts—accurate information.²⁵ These limits of truth and accuracy would not appear to apply in the case of criticism of people in public life, as the degree of protection of personal honor and good name is lessened when there is a relevant interest and a greater degree of tolerance is required of such persons, in light of the typical debate of political issues.²⁶

The judiciary in other Latin American countries has been a focal point of criticism by free speech experts by virtue of the existence of the right of reply that may force the media defendant to publish the entire text of a court decision involving criminal libel cases. An example of such a law is article 155 of the Criminal Code of Costa Rica, which

23. Colom. Const. Ct. J. 080 (Feb. 26, 1993).

24. Colom. Const. Ct. J. 609 (Dec. 14, 1992).

25. Colom. Const. Ct. J. 080 (Feb. 26, 1993).

26. *Id.*

authorizes such publications if the aggrieved party requests so.²⁷ Such right of reply for inaccuracies or grievances is guaranteed by a summary process that can be ordered within three days of the libelous or inaccurate publication. The reluctance to comply with the court order may lead to two years of incarceration for contempt should the Constitutional Chamber of the Costa Rican Supreme Court deem it necessary.²⁸ Under article 415 of the Code of Criminal Procedure in Ecuador, a special procedure is established in the case of criminal libel when allegedly committed by news media.²⁹ There is a special procedure and trial in the case of offenses against honor when allegedly committed by news media according to article 415.

In Guatemala, the latter is not unusual, in light of the special press juries that must be convened prior to the subsequent criminal trial when committed by a media defendant.³⁰ The jury decides whether an offense may have been committed, and if so will remand the criminal cause to a criminal court for the respective trial.³¹ In reality, the special juries have never been functional, but are utilized as threats to the press. The same press law establishes an ethical tribunal that may compel the media defendant to publish any rectifications or replies regarding the criticism of a public official.³²

In Honduras, a director of a medium may be incarcerated up to three months for not complying with a court order to publish the corresponding retraction or reply.³³ Upon the plaintiff's request, the medium can be compelled to publish the entire text of the court decision that finds the media defendant guilty of criminal libel. These publications create the extreme burden of occupying several pages of the newspaper.

Similarly restrictive laws exist in El Salvador. Journalists may be restrained from exercising their profession in criminal libel cases.³⁴ Gag orders and a private hearing may be issued under the discretion of the judge when public morals, public interest, and state security, may be compromised.³⁵

Paraguay also has harsh laws. The broad powers granted to the criminal courts under the Criminal Code of Procedure of 1998 make it plausible that judges may abuse their discretionary powers to close any

27. CÓDIGO CRIMINAL art. 155 (Costa Rica).

28. *Id.*

29. CÓDIGO PROCEDIMIENTOS PENALES [COD. PROC. PEN.] art. 415 (Ecuador).

30. Press Law of 1966, art. 48 (Guat.).

31. *Id.*

32. *Id.* art. 77.

33. Decree 110 of 1996, art. 165 (Hond.).

34. CÓDIGO PENAL [CÓD. PEN.] art. 180 (El Sal.).

35. Cód. PROC. PEN. art. 272 (1997) (El Sal.).

public hearing, specifically to the press, when the court deems that the honor, private lives or physical integrity of any of the parties may be affected, or when official or private secret information, commercial or industrial may be divulged.³⁶ A judge may ban any opinion in the courtroom or isolate any witness.³⁷ This has been frequently utilized by judges to issue gag orders to the press as well as to keep journalists from working as such until the orders are lifted.

Under the Peruvian Code of Criminal Procedure, an abbreviated process is established to judge cases of criminal libel with media defendants all to be completed within thirteen days, an unusually short term for the average length of trials under Peruvian law.³⁸ The press laws in the Dominican Republic³⁹ and Uruguay⁴⁰ also have harsh criminal procedures against journalists.

Notwithstanding legal restrictions, there is no doubt that the press is relatively free in the Western hemisphere with the exception of Cuba.⁴¹ Press freedom is simply afforded more protection in some countries than in others. In the majority of the countries studied, the legal provisions discussed are, for most case, simply not enforced.

It is noteworthy to mention that the worst problem affecting press freedom in the Western hemisphere is not the legal and judicial restrictions, but rather, the physical violence against the press. Countries such as Colombia, Mexico, Guatemala, and Brazil have the highest rates of

36. Cód. PROC. PEN. art. 368 (1998) (Para.).

37. *Id.* art. 372.

38. Cód. PROC. PEN. art. 314 (Peru).

39. Law 6132 of 1962, arts. 16 and 51 (Dom. Rep.) (special procedure exists for judging criminal libel cases when committed by media defendants along with stiffer prison terms than set out for non-media defendants in the Dominican criminal code); *id.* art. 46 (joint strict liability is established regarding criminal libel offenses among reporters and directors/editors).

40. Press Law of 1989, art. 31 (Uru.) (judge may order forced publication of entire text of sentence in cases of crimes of dissemination of false news and insults of public high officials).

41. See INTER AMERICAN PRESS ASSOCIATION, PRESS FREEDOM IN THE AMERICAS, 2001 ANNUAL REPORTER (2001) (providing country by country reports); Argentina: *id.* at 18 (reporting on the misguided use of the defense of the fair report privilege or "Campillay defense"); Brazil: *id.* at 24 (reporting on Gag Law bill that forbids the authorities from reporting to the press on matters that are being investigated by police, justice or administrative personnel); Chile: *id.* at 44 (reporting on the application of the State Security Law against journalists of *La Tereca* accused of attacking decorum of a high ranking official); Costa Rica: *id.* at 57, 59 (reporting on the forced publication of a ten-page reply of a grievance against *La Nacion* and the suspended sentence against a journalist under criminal libel); Ecuador: *id.* at 73 (reporting on the enactment of several anti-press bills); El Salvador: *id.* at 75 (reporting on the application of several provisions of the Criminal Code of Procedure that enable judges to discretionally issue gag orders and close courtrooms to the public); Paraguay: *id.* at 110-12 (reporting on accusations before a criminal court against several newspaper directors and journalists for alleged violations of the electoral ban and defaming high officials); Peru: *id.* at 115 (reporting on a court order to temporarily seize the presses of two newspapers opposing the government); Venezuela: *id.* at 140 (reporting on criminal libel suits against several newspapers).

murder of journalists.⁴² This violence, however, will not be the focus of the paper.

III. PENALIZING SPEECH: CRIMINAL LIBEL AND INSULT LAWS

The criminalization of speech is the most serious problem that the media faces. This includes the large number of legal provisions regulating the media, the broad and ambiguous definitions contained therein, and the lack of legal defenses. It is also interesting to discover that in many countries in the Americas, the press is regulated by laws specifically enacted to impose a standard of conduct on the coverage of news. Most of these laws were passed many decades ago during military regimes and most reflect a very restrictive scheme that purports to impose criminal liability for abuses, inaccuracies, excesses, and non-compliance with the legal requirements. Moreover, some of these laws were passed more than four decades ago, when newspapers were prevalent and there was no cable, mass television broadcasts, or Internet. As a result, these laws are outdated and do not reflect current societal interests and values regarding press freedom.

Such press laws have been enacted by the legislative bodies of Bolivia,⁴³ Brazil,⁴⁴ Chile,⁴⁵ Colombia,⁴⁶ Dominican Republic,⁴⁷ Ecua-

42. JAIRO E. LANAO, COMPARATIVE STUDY: THE PRESS LAWS AND CHAPULTEPEC (forthcoming 2002). In addition to citing the numerous criminal offenses journalists may be prosecuted for the dissemination of information, the study also cites several instances of broad judicial powers concerning the media that may lead to abuse. *See, e.g.*, Press Law of 1925, art. 28 (Bol.) (creating a special system of justice for offenses committed by the media); BRAZ. CONST. art. 16, §§ II and IV (1988) (subjecting media defendants to high moral damages, equivalent to punitive damages in the United States, for committing certain criminal offenses).

43. Press Law of 1925, art. 10 (Bol.) (prohibits attacks against the Constitution, in whole, or in part); *id.* art. 11 (prohibits attacking public order or advocating illegal conduct, obscenity, and immorality); *id.* art. 13 (outlines the elements for criminal libel).

44. Subverting political or social order is punishable by one to four years of jail time. Press Law of 1967, art. 15 (Braz.). Publishing or divulging state secrets, news relative to the preparation of internal or external defense, confidential news, or information of interest to national security is a crime. *Id.* art. 14. Publishing or divulging false news or distorted facts that may provoke disturbance of the public order, distrust of the banking system, create commotion in financial institutions or any other company that may prejudice official government entities or other companies, or cause an appreciable disturbance in the securities market is punishable by one to six months of jail time. *Id.* art. 16. Offending public morals and good customs is punishable by three months to one year of jail time. *Id.* art. 17. Using money or favors as an influence to publish or stop the publication of information or news, is punishable by four to ten years imprisonment. *Id.* art. 18. Advocacy of illegal behavior is punishable by one-third of the sentence of the principal crime, up to one year of imprisonment. *Id.* art. 19. If the crime is accomplished, however, the person advocating such illegal behavior shall receive the same sentence as prescribed for the crime. *Id.* Committing criminal libel, either by falsely accusing someone of a crime or by publication, is punishable by six months to three years of jail time. *Id.* art. 20. Attacking a person's reputation with offensive facts is punishable by three to eighteen months of jail time, which is greater for media defendants than for non-media defendants. *Id.* art. 21.

dor,⁴⁸ Haiti,⁴⁹ Honduras,⁵⁰ Mexico,⁵¹ Panama,⁵² and Uruguay.⁵³ In each

Insulting the president or other high-ranking official is prohibited and punishable by a sentence prescribed by the aforementioned articles, plus a third of the sentence for the original crime.

45. See Press Law 19.733 of 2001, (Chile) (on the freedom of opinions and of information and the exercise of journalism); *id.* art. 34 (prohibiting offenses against good customs).

46. See Law No. 29 of 1944, art. 27-29 (Colom.) (criminalizing incitement to lack of discipline or military insubordination and prohibiting the publication of false news).

47. See generally Law of Expression and Dissemination of Thought, Law No. 3162 (1962) (Dom. Rep.) (creating a series of crimes aimed at punishing the press). For example, receiving funds from a foreign government for a purpose other than advertising is punishable by up to two years in prison. *Id.* art. 16. Criminal libel, which is applicable in cases of defamation or offenses committed through a news medium, is punishable by longer prison sentences than under the Penal Code which provides for special proceedings. *Id.* art. 51. See also *id.* art. 46 (strict liability for directors, editors, reporters, printers, and distributors); *id.* art. 24 (prohibiting advocating others to commit crimes against the internal state security); *id.* art. 27 (providing for up to two years imprisonment for the publication, dissemination, or reproduction of false news which disrupts public order); *id.* art. 26 (taking a position against public interest, good behavior, foreign dignitaries, or the president is punishable by up to one year of imprisonment); *id.* art. 29 (prohibiting criminal libel, even by inference); *id.* art. 30 (defamation of a court, tribunal, member of the armed forces, or police officer is punishable with up to one year in prison); *id.* art. 31 (criminalizing defamation of a member of Congress or a public official, and punishes such acts with up to one year of imprisonment); *id.* art. 34 (prescribing up to three months of imprisonment for defamation of the authorities mentioned above); *id.* art. 39 (punishing offenses committed against foreign dignitaries with up to one year in prison); *id.* art. 42-43 (criminalizing the publishing of court proceedings, releasing information about current trials, disclosing criminal matters involving minors, or bringing sound or video equipment into a courtroom).

48. See Cód. PEN. art. 490 (Ecuador) (defines grievous, non-libelous slander); *id.* art. 493 (punishes those who commit libel against a public official, with up to two years of imprisonment); *id.* art. 495 (prescribes a maximum of six months in prison for those who commit libel against a private individual); *id.* art. 498 (referring to libel committed in a foreign publication; setting penalties for anyone who provides such libelous information or orders its publications); *id.* art. 499 (prohibiting the reproduction of a libelous text or graphic, even when it has already been published in Ecuador or abroad). The Penal Code imposes up to two years of imprisonment for anyone who offends senior public officials, including those who are not necessarily high-ranking, through threats or slander. Cód. PEN. art. 230-31 (Ecuador). Also, the Penal Code imposes up to four days of imprisonment or severe fines upon anyone who disseminates false news or rumors regarding national security, national honor, public order, the honor of individuals, families, or the intimate life of families. *Id.* art. 606. Article 417, which contains the ambiguous term, "immoral," broadens the definition of offenses against honor committed through the news media to include immoral writings, dealing with obscene, dishonest, or dishonorable matters concerning a person's private life, that are contrary to respectable behavior. *Id.* art. 417. See also *id.* art. 415 (outlines a determination of joint liability between the owners, editors, or management of a newspaper and the author of a publication that could be seen as libelous).

49. See Press Law of 1986, art. 13 (Haiti) (provides for strict criminal liability if an editor or manager publishes an unsigned article); *id.* art. 16 (criminalizing publishing charges or criminal proceedings in a manner likely to influence a court decision, jurors, or judges; publishing the damage awards ordered by correctional or criminal courts; fraudulently obtaining a journalist license; publishing death threats in a news medium; publishing items harmful to morals or young people); *id.* art. 18 (prohibiting the publication or transmission of information offensive to good customs or morals); *id.* art. 19 (failing to publish information based on the right of reply is punishable by suspension of the news medium or suspension of distribution); *id.* art. 20 (providing that anyone ordering the publication of defamatory information in foreign newspapers can be subject to legal action).

50. See Press Law of 1958, art. 8 (Hond.) (criminalizing disrespect of person's private lives or

country, jail time, fines, and even the closing of newspapers are among the sanctions for violations of these rules.

Immense problems of definition, among others, plague the aforementioned laws. There is a lot of ambiguity in the statutory language of the laws that affect the free flow of information. Some examples are the use of terms such as "good customs," "public morals," "integrity of the nation," and "private lives." All of the press laws contain provisions that prohibit publication of information varying from the dissemination of false information to violating the public morals or good customs of the country.⁵⁴

morals by causing harm to reputation, interest, or family relations); Press Law of 1986, art. 38 (Haiti) (criminalizes the knowing publications of a false advertisement; prohibits capricious attacks against companies for the purpose of avenging past grievances or discrediting people or institutions; forbids advertising extortion in all of its manifestations; and makes it illegal to publish pornographic photographs, drawings, cartoons, or obscene jokes).

51. See Press Law of 1917, art. 1-3 (Mex.) (criminalizing attacks on privacy, morality, public peace, or public order); *id.* art. 2 (defining an offense against morality as offending modesty, decency, or good habits, inciting prostitution, or encouraging the practice of licentious or immodest acts). Article 2 also expands the definition of offenses against morality to include the distribution or sale of items of an obscene nature. *Id.* See also *id.* art. 3 (establishing that acts discrediting, ridiculing, or destroying the fundamental institutions of the nation amounts to an attack against peace and order); *id.* art. 9 (prohibiting disclosure of crimes of adultery, offenses against modesty, rape, or other sexual misconduct and the publishing of cases relating to divorce, paternity, maternity, marriage annulment, or child recognition, unless consent is obtained from the parties involved); *id.* art. 14-17 (holding the publisher, editor, manager, and printer to a standard of strict liability).

52. See Law No. 11 of 1978 (Pan.). The law, although partially repealed in December 1999, still contains a few provisions that encompass criminal offenses devised for the media. *Id.* For example, when the media commits criminal offenses, the directors of the news papers are held to a strict criminal liability standard. *Id.*

53. See Press Law of 1989, art. 16 (Uru.) (increasing the penalties when crimes are committed through the press, and providing that such crimes must be investigated officiously); *id.* art. 19 (punishing both the knowing dissemination of false news that causes a grave disturbance in the public order or grave effects on the state's economic interests, and the instigation of insults and attacks on the nation, the state, or its branches of power, with up to two years of imprisonment); *id.* art. 24 (providing that owners, editors, or managers concealing their positions as such will be subjected to two years in prison).

54. See Cód. PEN. art. 111 (Arg.) (preventing the use of truth as a defense in certain slander cases); *id.* art. 128 (providing for imprisonment of up to one year of anyone who publishes, produces, or reproduces obscene books, articles, images, or objects and anyone who exhibits or distributes them); Cód. PEN. art. 162 (Bol.) (insulting or defaming a public official in the performance of his/her duties or because of such duties).

Press Law of 1967, art. 13 (Braz.) (making propaganda so as to undermine public and social order is punishable by one to four years' imprisonment); *id.* art. 22 (offending dignity or decorum is punishable by one month to one year in prison); *id.* art. 23 (defaming or libeling the president of Brazil, senior officials and foreign dignitaries, any public official with regards to his duties, or any public body or authority increases the penalty by one-third). See *supra* note 44 for a description of articles 14-21 of the Brazilian Press Law of 1967. Cód. PEN. art. 331 (Braz.) (causing humiliation, discreditation, or disrespect for an official willfully, by aggressive shouting, etc.).

State Security Law, art. 4 (Chile) (crimes against state internal and external security); CÓDIGO PENAL MILITAR [Cód. PEN. MIL.] art. 255 (Chile) (dissemination of secret military

information); *id.* at 276 (publication of information that incites to riot or disorder); *id.* art. 284, 417 (defamation and libel of military officers); Law No. 18,045 on Stock Market Exchanges art. 61 (Chile) (dissemination of false stock market news); CÓDIGO DE SALUD art. 53-54 (Chile) (dissemination of information that leads people to believe in curative powers of certain elements); Law No. 19, 366 on Narcotics, art. 17 (Chile) (dissemination of information concerning investigations into drug trafficking); Law No. 19,223 on Electronic Information, art. 1-2 (Chile) (interception of or interference with information in the case of electronic media); CÓD. PEN. art. 263 (Chile) (defamation of the president or other senior officials).

CÓD. PEN. art. 122 (Colom.) (offending a diplomate); *id.* art. 154 (revealing secret or confidential information by a public employee); *id.* art. 188 (advocating illegal behavior); *id.* art. 288 (imposing liability on any person who unlawfully steals, hides, misplaces, destroys, intercepts, controls, or prevents a private communication intended for another person or unduly becomes aware of its contents); *id.* art. 313-15 (criminalizing libel).

CÓD. PEN. art. 152 (Costa Rica) (publication of libel proceedings); *id.* 387 (malicious dissemination of false information that causes harm to the public peace, public order, etc.); *id.* art. 307 (offending the honor or decorum of public officials is punishable by two years in prison under the insult laws).

CÓD. PEN. art. 283 (Dom. Rep.) (writing, publishing or distributing unsigned material is subject to up to six months in prison); *id.* art. 285 (advocating others to commit crime through a publication and distributing the offending matter may be subject to three months in prison); *id.* art. 287 (distribution or exhibition of images contrary to morals or good behavior is punishable by up to one year in prison).

CÓD. PEN. art. 493-95 (Ecuador) (anyone committing libel of an official faces imprisonment of up to two years, while anyone committing the same offense against a private individual faces a maximum sentence of six months in prison); *id.* art. 498 (punishing anyone who orders a defamatory matter to be published abroad); *id.* art. 499 (criminalizing the reproduction of a libelous text or graphic, even when it has already been published in Ecuador or abroad); *id.* art. 417 (immoral writings by the news media that are contrary to respectable behavior, dealing with obscene, dishonest, or dishonorable matters concerning a person's private life); *id.* art. 230-31 (anyone who, through threats or defamatory matter, offends senior public officials faces criminal sanctions of up to two years' imprisonment); *id.* art. 606 (anyone who disseminates false information or rumors regarding national security or honor, public order, the honor of individuals or families or their intimate life will face up to four days of imprisonment or severe fines).

CÓD. PEN. art. 177 (El Sal.) (punishing criminal libel with the maximum penalty being four years in prison when published in writing (article 181) or is seen by unspecified number of people); *id.* art. 178 (attributing to a person conduct or characteristics capable of damaging his honor with the maximum penalty being increased from two to three years' imprisonment when the accusation is given publicity); *id.* art. 179 (offending, by word or deed, the dignity or decorum of a person with maximum penalty being increased from two to three years in prison when the accusation is given publicity); *id.* art. 180 (suspension from work as a journalist when the above-mentioned offenses are committed in a news medium); *id.* art. 182 (libel can be committed by allegory, caricature, emblem, or allusion); *id.* art. 184 (knowingly disseminating secret or private matter is punishable by a fine of the equivalent of thirty to fifty day's pay); *id.* art. 339 (offending, by word or deed, the reputation or decorum of a public official shall face up to three years' imprisonment); Press Law of 1950, art. 6 (El Sal.) (editors are liable for any anonymously submitted articles in his news medium); CÓD. PEN. art. 396 (El Sal.) (disrespecting a national symbol is punishable by a fine of the equivalent of ten to twenty days' pay).

CÓD. PEN. art. 164 (Guat.) (libel is a criminal offense); *id.* art. 196 (publishing obscene material); *id.* art. 222 (unauthorized public display or dissemination of correspondence, papers, recordings or photographs).

CÓD. PEN. art. 313-23 (Haiti) (covering criminal libel); Press Law of 1986, art. 22 (Haiti) (publication of case files in criminal proceedings in the case of minors carries a penalty of up to one year in prison); CÓD. PEN. art. 183-85 (Haiti) (law of contempt contained in the Penal Code which makes contempt of public officials punishable by up to one year in prison and/or fines).

All those prohibited publications amount to prior restraint.

A. *Criminal Libel*

Speech is most consistently punished through criminal actions against the journalists and newspapers when defamation of individuals or the publication of inaccuracies occurs. As stated above, all Latin American countries have laws that provide for criminal libel. Surprisingly, the common law jurisdictions do as well.⁵⁵ Notwithstanding this

CÓD. PEN. 161 (Hond.) (publication or reproduction of libelous material is subject to same penalty as authors of libelous material); *id.* art. 162 (libel could be committed through representations, cartoons, comics, emblems, and allusions); *id.* art. 415 (refusing to publish the reply or retraction on behalf of the plaintiff, maliciously divulge facts relative to the private life of an individual, maliciously publish false information, inciting civil disobedience, advocating illegal behavior, offending public morals or good customs).

CÓD. PEN. art. 350 (Mex.); *id.* art. 199-200 (showing disrespect for national symbols and of obscenity); *id.* art. 211 (as amended) (disseminating private information); *id.* art. 403 (disclosing results of opinion polls during election period); *id.* art. 189 (punishment for any of the above offenses committed against a public official shall be increased from one to six years' imprisonment).

CÓD. PEN. art. 169-94 (Nicar.) (criminal libel); *id.* art. 260 (establishing limitations on press freedoms); *id.* art. 347 (insult laws); *id.* art. 560 (attacking the public morality by the use of words, representations, paintings, emblems, acts or obscene gestures).

CÓD. PEN. art. 168 et seq. (Pan.) (criminalizing the disclosure of private conversations or information); *id.* art. 172 et seq. (criminal libel); *id.* art. 372 et seq. (dissemination of false information concerning the economy and business); *id.* art. 307 (criticism of the president); *id.* art. 308 (criticism of government agencies); Health Code of 1947, art. 171 (Pan.) (publication of advertising and propaganda referring to hygiene, preventive and curative medicine, drugs, etc. without the prior authorization of the Public Health Department); Electoral Law, art. 178 (Pan.) (the dissemination of opinion polls in the ten days before elections); Decree No. 251 of 1969, art. 17 (Pan.) (offending good customs and moral behavior).

In Paraguay there is no clear distinction between libel and defamation. *See* CÓD. PEN. art. 150-52 (Para.). Additionally, the express protection of honor, reputation, and personal and family privacy, are concepts that are reinforced in both the Penal Code and the Constitution. PARA. CONST. art. 4.22 (1992). These protections are almost excessive. They include: CÓD. PEN. art. 143 (Para.) (injuriously breaching personal or family privacy is punishable by a fine); *id.* art. 144 (unauthorized disclosure of private communications and transmission of the private photographs is punishable by up to two years' imprisonment); *id.* art. 145 (violating a confidence in any medium shall be punishable by a fine); Law 834 of 1996, art. 324 (Para.) (violating the ban on electoral propaganda is punishable by from one to six months' imprisonment); CÓD. PEN. art. 146 (Para.) (opening a private communication or making its contents known is a violation punishable by up to one year's imprisonment); *id.* at 147 (revealing a private professional secret is punishable by imprisonment up to one year); *id.* art. 150-52 (publication of a libel may be punishable by up to two years' imprisonment); *id.* art. 153 (denigration of a deceased person is a punishable offense).

CÓD. PEN. art. 130-33 (Peru) (criminal libel); *id.* art. 249 (the dissemination of false information causing financial distress); *id.* art. 157 (collection or distribution of information regarding religious or political convictions of private individuals); *id.* art. 156 (publishing aspects of the private lives of employees is punishable by up to one year of prison); *id.* art. 374 (attacking the decorum or dignity of a high public official).

55. In Canada, criminal libel is punishable by up to five years in prison Criminal Code, R.S.C., ch. C-34, § 300 (2002) (Can.). Up to now, the statute has never been utilized against a media defendant. In Jamaica, libel requires malice and falsehood. Puerto Rico makes defamation

similarity, the most notable difference between common law and civil law jurisdictions is that criminal libel is not typically enforced against media defendants in common law countries such as the United States, Canada, and Jamaica.

Criminal libel is most egregious when the criminal complaint is presented by public officials against media defendants. Political dissent should not be dissuaded by potential prosecution for libel. If such prosecutions become commonplace, as they have in Chile, Brazil, Panama, and Paraguay, among others, the chilling effect may cause the media to

a punishable offense. A defendant can get up to six months in prison for publishing dishonoring or discrediting mandatory publication of a court information about a person. 33 P.R. LAWS ANN. § 4101 (1984). Please note that both in state or federal courts any accusation under the color of the aforementioned statute would most likely not pass constitutional muster under the United States' First Amendment. The same may be said with respect to many criminal law statutes under various state laws in the United States. Though they are still in the books, they would be probably declared unconstitutional. See *Garrison v. Louisiana*, 379 U.S. 64 (1964). There are several jurisdictions with criminal libel statutes: ALA. CODE § 13A-11-163 (1975); COLO. REV. STAT. § 18-13-105 (1977) (knowing publication of a libel is a minor felony); D.C. CODE ANN. § 22-5101 (repealed); IDAHO CODE § 18-4801-4809 (Michie 1999); IOWA CONST., art.1 § 7 ("In all prosecutions or indictments for libel, the truth may be given in evidence to the jury, and if it appears to the jury that the matter charged as libelous was true, and was published with good motives and for justifiable ends, the party shall be acquitted."); KAN. STAT. ANN. § 21-4004-4006 (1995) (requires a showing of actual malice in criminal prosecutions that involve speech on matters of public concern); *Richardson v. State*, 7 A. 43 (Md. 1886) (action exists for criminal libel if the defamatory words tended to disgrace or degrade the person libeled); MICH. COMP LAWS § 750.370 (2001) (misdemeanor to falsely and maliciously attribute to another the commission of a crime or infamous or degrading act); MICH. COMP. LAWS § 600.2911 (2001) (impute to a female a want of chastity); MICH. COMP. LAWS §§ 750.97, 500.2009 (2001) (false or malicious statements concerning the financial condition of various businesses); MINN. STAT. §§ 609.765, 609.77, 628.22, 631.06 (2001); MISS. CODE ANN. § 97-3-55 (1972) (struck down under *Boydston v. State*, 249 So. 2d 411, 413-14 (Miss. 1971), because it did not define the crime of libel); NEV. REV. STAT. §§ 200.520-200.560 (Michie 2001); N.Y. PENAL § 215.50(5)(2001) (criminal contempt if one knowingly publishes a false or grossly inaccurate report of a court's proceedings); N.C. GEN. STAT. § 14-47 (2001) (a person who communicates a false and libelous statement concerning any person or corporation to a newspaper or periodical for publication and, who thereby secures such is guilty of a misdemeanor); N.D. CENT. CODE § 12.1-15-01 (1997) (criminal libel); OHIO REV. CODE ANN. § 2739.99 (West 2000) (criminal libel); OKLA. STAT. ANN. tit. 21, § 771-81 (West 2000) (criminal libel); S.C. CODE ANN. § 16-7-150 (Law Co-op. 1985) (libel and slander defined as uttering, circulating, or publishing any false statement or matter with malicious intent which injures another's character); TEX. REV. FIN. STAT. ANN. § 59.002 (2001) (a felony to knowingly communicate or induce another to communicate an untrue statement derogatory of a bank's financial condition with the intent to injure the financial institution); UTAH CODE ANN. § 76-9-404 (1999) (criminal defamation is knowingly communicating to any person orally or in writing any information which he knows to be false and knows will tend to expose any other living person to public hatred, contempt, or ridicule); VA. CODE ANN. § 6.1-119 (Michie 1999) (derogatory statements affecting banks); VA. CODE ANN. § 18.2-209 (Michie 1999) (knowingly made false statements to the press); VA. CODE ANN. § 18.2-416 (Michie 1999) (use of abusive language); VA. CODE ANN. § 18.2-417 (Michie 1999) (words insults or words tending to violence or breach of the peace); WASH. REV. CODE ANN. §§ 9.58.010-9.58.020 (2001) (criminal libel); WIS. STAT. ANN. § 942.01 (West 1999).

abstain from reporting on matters of general concern particularly on political affairs.

Elimination of criminal libel has been a world cause embraced by numerous human rights organizations in Europe and other countries. These organizations contend that laws establishing prosecution for defamation should be repealed because they insulate government officials from criticism and obstruct reporting on public corruption.⁵⁶ The Proclamation stated that libel laws cannot be justified if their purpose or effect is to protect individuals against harm to a reputation which they do not have or do not merit, or to protect the "reputations" of entities other than those which have the right to sue and to be sued. In particular, libel laws cannot be justified if their purpose or effect is to: prevent legitimate criticism of officials or the exposure of official wrongdoing or corruption; protect the "reputation" of objects, such as governmental or religious symbols, flags, or national insignia; protect the "reputation" of the State or nation; enable individuals to sue on behalf of persons who are deceased; or allow individuals to sue on behalf of a group which does not, itself, have status to sue. Libel laws also cannot be justified on the basis that they serve to protect interests other than reputation, where those interests, even if they may justify certain restrictions on freedom of expression, are better served by laws specifically designed for that purpose. In particular, libel laws cannot be justified on the grounds that they help maintain public order, national security, or friendly relations with foreign States or governments.

Despite this consensus, criminal libel continues to exist in most countries of the world. In the criminal libel provisions in most Latin American countries, truth is not a defense.⁵⁷ Of course, in the United

56. For a discussion of the proposed Article 19, see Article 19 International Centre Against Censorship, International Workshop on Defamation Law, London, England (Feb. 29-Mar. 1, 2000), available at <http://www.article19.org>.

57. It is important to remember that under Latin American law, libel has three forms. The first is a more serious offense with greater jail time and is defined in terms of falsely accusing another of a crime. The second modality of libel is less injurious and usually involves the attack of the person's good name or reputation. In the latter case, no legislation permits truth (*exceptio veritatis*) as a defense. The third form of libel is simple defamation without attacking the profession or character of the person. The following statutes do not allow for truth as a defense to libel: Cód. PEN. art. 111 (Arg.); Cód. PEN. art. 131 (Braz.); CHILE CONST. art. 19 ¶ 4; Cód. PEN. art. 317 (Colom.) (truth can be used as a defense in libel cases except in the case of a dismissal, acquittal, or abandonment of proceedings, or when the alleged facts involve sexual, conjugal or family life or the victim of a sexual crime; truth is not allowed as a defense when information is published about a person's intimate life); Cód. PEN. art. 149 (Costa Rica); Cód. PEN. art. 497 (Ecuador) (truth shall not be admitted as a defense in the case of libel attacking the character of the person); Cód. PEN. art. 183 (El Sal.) (truth is a defense in certain libel cases as exoneration of the criminal charges; it is noteworthy that Article 183 admits the truth when the facts that are the subject of offenses concerning honor refer to prominent people and such dissemination fulfills the function of a free flow of information in a democratic society, except when it is contrary to

States, truth no longer has relevance in libel law because falsity is the major concern for the plaintiff.⁵⁸ More defenses need to be developed by the civil law legal scholars for libel law, either in the criminal or civil treatment of the offense or abuse.⁵⁹

A defense largely needed is one of fair comment or opinion. Most Latin American legal schemes, however, fail to provide such a defense. Having this defense would likely reduce the amount of defamation actions. Under American defamation law, statements of fact versus opinions have long been object of lengthy discussion and analysis by legal scholars and the courts.⁶⁰ Since the *Gertz*⁶¹ case in 1974 and the

matters protected by the right to personal or family privacy); Press Law of 1962, art. 37 (Dom. Rep.) (in the case of libel, truth is only applicable when it is sought to prove the veracity of the alleged defamation of a public official when it has to do with the functions of the offended public sector person or agency and cannot be used in the case of the private life of a person or when the imputation refers to a fact that is an offense that has been subject to amnesty or statute of limitations); Cód. PEN. art. 160-62 (Guat.); Cód. PEN. art. 314 (Haiti) (in libel cases, truth is not admissible as a defense that the facts giving rise to the lawsuit are well known or have been copied or extracted from a foreign publication, even though they may be true); Cód. PEN. art. 158 (Hond.) (prohibits the use of truth as a defense in the case of injuring the reputation of public officials); Cód. PEN. art. 177 (Pan.); PARA. CONST. art. 23 (truth can be used as a defense only in cases where a public official's honor or reputation is offended by reference to his public conduct, not his private life); Cód. PEN. art. 134 (Peru); Cód. PEN. art. 336 (Uru.) (limits the use of truth in the case of defamation and libel when it is not attributing the commission of a crime to another).

58. See REX S. HEINKE, *MEDIA LAW* 98-99 (1994). The common law rule that truth needed to be plead and proved as a defense was displaced by several United States Supreme Court rulings that have held that most defamation plaintiffs have to prove is fault to prevail. *Id.* Therefore, as logic may dictate, there has to be falsity for a successful libel suit. *Id.* at 99. If the libel is against a private person, the defendant must be negligent in determining whether the statement or defamatory matter was true or false. If the plaintiff is a public official or public figure, then the standard is actual malice. *Id.* The plaintiff must prove the falsity by proving that the defendant published the statement despite knowing it was false or entertained serious doubts about its truthfulness. *Id.*

See also ROBERT D. SACK, *SACK ON DEFAMATION LIBEL, SLANDER AND RELATED PROBLEMS*, Vol. 1 3-5 (3d ed. 1999). As noted by the author, "In the 1964 case of *Garrison v. Louisiana*, 379 U.S. 64 (1964), the Supreme Court flatly said that under the First Amendment truth could never be actionable in any lawsuit, for defamation or otherwise." *Id.* This principal was unconditional so long as the subject of the communication was of public interest. *Id.* Eleven years later, however, in *Cox Broadcasting Corporation v. Cohn*, 420 U.S. 469 (1975), the Court retreated by stating, "The Court . . . has carefully left open the question whether the First and Fourteenth Amendments require that the truth be recognized as a defense in a defamation action brought by a private person as distinguished from a public official or public figure." *Cox*, 420 U.S. at 490.

59. For example, the common law treatment under Jamaican law provides for a series of defenses such as justification, absolute privilege, qualified privilege, fair and accurate comment, unintentional defamation, and consent. For a detailed analysis of Jamaican defenses for libel, see LANAO, *supra* note 2, at 347-77. See generally SACK, *supra* note 58; HEINKE, *supra* note 58.

60. See generally SACK, *supra* note 58.

61. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). The Supreme Court observed that, "We begin with the common ground. Under the First Amendment there is no such thing as a false idea. However, pernicious an opinion may seem, we depend for its correction not on the conscience of judges or juries but on the competition of ideas." *Id.* at 339-40. A syllogism was

*Milkovich*⁶² case in 1990 the doctrine regarding the defense of opinion is still an ongoing debate. Regardless, Latin America needs to begin an academic discussion of these defenses⁶³ in order to move towards eliminating criminal libel altogether.⁶⁴

The debate on libel defenses continues even in the United States. American courts still question the issue regarding the distinction between an allegation of fact and expression of opinion. Sack stated:

This distinction often depends on what is stated in the rest of the [communication]. If the defendant accurately states what some public man has really done, and then asserts that "such conduct is disgraceful," this is merely a [a nonactionable] expression of his opinion, his comment on the plaintiff's conduct.⁶⁵

United States libel law has developed as a long line of court decisions that have enriched the libel theory. In determining whether an abuse had been committed, the courts consider both the words taken in context and the customary usage of the words.⁶⁶ Under the American system, juries will determine whether the defamatory matter is indeed libelous.

All of this may seem logical and elementary, but the basic notions of establishing whether statements are defamatory, whether it is a mere opinion that discloses all relevant information, needs to be advanced by Latin American media attorneys and scholars. Latin American constitutional scholars must devise defenses, standards of conduct, and guidelines for judicial review regarding freedom of speech and expression of thought.⁶⁷ Special effort should be made to develop a set of rules

construed as a result: A defamation is actionable only if it false, opinions cannot be proved false; therefore, opinions can never be actionable, no matter how derogatory they may be.

62. *Milkovich v. Lorrain Journal Co.*, 497 U.S. 1 (1990). The *Milkovich* Court held that there was sufficient constitutionally-based protection for opinion otherwise firmly in place. For example, *Philadelphia Newspapers v. Hepps*, 475 U.S. 767 (1986), established that most statements must be proven false before liability may ensue. Therefore, protections for opinions exists so long as the statement is not proven false. There is also protection, said the *Milkovich* Court, under its cases protecting invective, a vigorous epithet, loose, figurative language, or lusty and imaginative expression. *Milkovich*, 497 U.S. at 19-23. Generally, this is speech that, although literally containing assertions of fact, is intended to express only points of view.

63. Examples of absolute and qualified privileges in Latin American libel law are sparse.

64. In June 2000, there was a meeting of Latin American journalists and jurists in Buenos Aires to discuss the decriminalization of libel in Argentina. The bill resulting from such meeting of experts was debated in the Argentine Congress, but never approved.

65. See SACK, *supra* note 58, at 220 (quoting *Leers v. Green*, 131 A.2d 781, 787 (N.J. 1957)).

66. See BARBARA DILTON, *THE JOURNALISTS HANDBOOK ON LIBEL AND PRIVACY* (1986) (how to use the opinion privilege and what is typically considered opinion by the courts).

67. Without doubt one of the pillars in the development of the United States's First Amendment safeguards has been the role of judicial review as established by Chief Justice Marshall in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). Arguably, independent judicial review that is not typical of civil law systems contributes some degree to the formation of the

regarding evidentiary burdens of persuasion and production guidelines for estimation of awards for harm to reputation and other intangibles. A comparative approach of evaluating and adopting the schemes and experiences of other countries that provide higher levels of protection for speech would be helpful. No one is suggesting that the First Amendment of the United States Constitution could be transplanted successfully to the Latin American context, particularly in light of the American tradition and history for its civil liberties, but there are valuable lessons to be learned from American libel law such as the actual malice standard of criticism of public officials, burdens of production, and damage assessment. There is also a need for guidelines in the determination of what is or is not defamatory matter.

B. *Insult Laws*

The single most disturbing law that provides for subsequent criminal punishment is the insult law. These laws are essentially criminal libel laws that punish statements against a high-ranking government official. Normally, insult laws increase the punishment with respect to the common criminal libel. Of the twenty-four countries studied, seventeen countries have insult law provisions.⁶⁸ There is no doubt that insult

societal value, protection, and legal treatment of freedom of speech and the press. It possibly differentiates those fundamental rights in the United States from the Latin American countries. In the latter, historically, judicial review had a later development and is currently more limited than in the United States. The constitutionalization of libel law in the United States by virtue of *New York Times v. Sullivan*, 376 U.S. 254 (1964), and the constitutional judicial standard of review for governmental regulation of speech as set forth by the strict scrutiny standard are factors that distinguish United States libel law from Latin American libel law. That can also be professed regarding the basic differences between American libel law and Canadian libel law as discussed by Douglas A. Alderson in his article, *The Constitutionalization of Defamation: American and Canadian Approaches to the Constitutional Regulation of Speech*, 15 ADVOCATES' Q. 385 (1993).

68. See LANAQ, *supra* note 2; Cód. PEN. art. 162 (Bol.) (violation if anyone "through any means, libels, slanders or defames a public official while performing his duties or as a result of them;" penalty varies depending if the acts are directed against the President or Vice President of the Republic, ministers of State, justices of the Supreme Court or members of Congress); Cód. PEN. art. 331 (Braz.) (committing contempt of a public official in carrying out his duties is punishable by six months to two years' imprisonment; Brazilian case law has interpreted the offense to include any word or act bringing upon an official humiliation, discredit or disrespect, by willful action, libelous utterances, violence, physical aggression, obscene gestures, shouting); Press Law, art. 23 (Braz.) (penalty to be increased by one-third if the insult is committed against the president of Brazil, senior government or foreign officials, any public official with regard to his duties, or any public body or authority); Cód. PEN. art. 141 (Braz.) (penalty for insult against public officials); State Security Law, art. 6 (b) (Chile); Cód. PEN. art. 284 (Chile) (insult); Cód. MIL. PEN. art. 263 (Chile) (all contain the concept of contempt, defining different victims of the crime); Cód. PEN. art. 307 (Costa Rica) (punishes whoever offends the honor or decorum of a public official with a penalty from one to two years of prison); Cód. PEN. art. 144 (Cuba) (defines this offense as: "He who threatens, libels, defames, insults or slanders in any way or offends, by speech or in writing, the dignity or decorum of an authority, public official or their agents or assistants in the exercise of their duties or on the occasion of or by reason of them" with

laws are extremely damaging to a free press. They obstruct investigative reporting. They do not define the limits of what is permissible when investigating matters of public concern. They do not permit the investigation into the private lives of officials hence, hindering investigations into corruption.

As a result of the conviction of Horacio Verbitsky, an Argentine journalist, by the Argentine Supreme Court in 1992, for violating Argentina's insult law, these laws became a focal point of human rights activ-

punishment varying based on status of insulted officials); Cód. PEN. art. 368 (Dom. Rep.) (defamation or public slander that targets the head of state will be punished by a prison term of three months to one year, plus a fine); *id.* art. 42 (allows for a special and total suspension of the civil and political rights); *id.* art. 369-70 (increases penalties if insults against high government officials or law enforcement); *id.* art. 30-34 (defines various penalties based on who is insulted, including fines and prison time); Cód. PEN. 230-31 (Ecuador); Cód. PEN. art. 339 (El Sal.) makes it a punishable offense to offend by word or deed the good name or decorum of a public official in carrying out his duties or by virtue of them; officials cannot be freely criticized for their work as such by doing so their own good name or decorum is offended. *Contra id.* art. 183 (protects information and deems it lawful when the facts that are the subject of offenses concerning honor (that is, libel) refer to prominent people and such dissemination fulfills the function of a free flow of information in a democratic society, *except* when it is contrary to matters protected by the right to personal or family privacy); Cód. PEN. art. 411-12 (Guat.) (establishes contempt against the Presidents of State Organizations and against authority); GUAT. CONST. art. 35, ¶ 2 (publications which contain denunciations, criticisms or imputations against officials or public servants for acts incurred in the exercise of their duties do not constitute violations of law or offenses); Cód. PEN. art. 183-85 (Haiti); Cód. PEN. art. 323 (Hond.) (defines contempt as when one threatens, insults or in any other way offends the dignity of a public authority in the exercise of their duties or as a result of them) *id.* art. 323 (defines penalty for insulting the President); *id.* art. 325 (defines penalty for insulting high government officials); *id.* art. 345 (sets penalties for insults); Press Law of 1917, art. 2-5, 33 (Mex.) (provides for criminal punishment of up to two years' imprisonment for those who through publications commit the crimes of discrediting, ridiculing or destroying official institutions; makes criticism of officials in the various branches of government subject to charges being laid and criminal prosecution, thus restricting freedom of expression and press freedom in an extreme manner); CÓDIGO CIVIL [C.P.D.F.] art. 189 (Mex.) (punishment increased to one to six years' imprisonment when the offenses are committed against public officials); *id.* art. 191, 200, 221 (provide for several years' imprisonment for those who commit insult to national symbols, publication of obscene material or divulge private conversations); Cód. PEN. art. 347 (Nicar.) (insult defined as (1) challenging a public official to a duel, libel, slander or insult, by word or deed, threaten a public official; (2) seriously disrupting a court or tribunal proceedings and anywhere else authorities or public officials may be carrying out their duties; (3) bearing arms, without legal authorization, openly or concealed, in the Congressional chamber or any legislative chamber or courtroom; (4) preventing a public representative or official from going to his chambers or office; (5) openly disobeying authority); *id.* art. 348 (punishable by imprisonment of six months to four years) Cód. PEN. art. 307-08 (Pan.) (contempt against the President); Cód. PEN. art. 347 (Peru) (threat or insults against public official subject to incarceration of no more than three years unless official is President); Cód. PEN. art. 173 (Uru.); Cód. PEN. art. 223 (Venez.) (defines contempt as an offense in the presence of a government official and motivated by his official status); *id.* art. 26 (sets penalties); *id.* art. 227 (the accused will not be permitted to introduce any evidence about the truth nor about the notoriety of the facts or the alleged flaws of the offended party); *id.* art. 228 (standard not applied in the case of an official who has abused his authority).

ists.⁶⁹ His case was heard by the Organization of American States Commission on Human Rights. In 1994, it resulted in the Commission issuing a report declaring the incompatibility of insult laws in light of the guarantees of freedom of expression contained in Article 13 of the American Convention of Human Rights.⁷⁰ The report concluded that insult laws, or as stated in the report "contempt laws," afford public officials an unjustifiably unique protection that other individuals of society do not have. It also demonstrated that the fear of incarceration dissuaded individuals to express political commentary and their opinions on matters of public interest, especially since the laws often did not distinguish between facts and opinions.

The Commission's report provoked such a battle, that in 1994 the Argentine government passed a law repealing its insult law provision contained in the Argentine Criminal Code.⁷¹ Other countries have followed the Commission's recommendations, leading to positive changes both in Latin American case law and legislation. One example is the repeal of the Paraguayan insult law with the issuance of the 1998 Penal Code. It is difficult, however, to know whether the elimination of the insult law was intended and a direct result of lobbying by legal experts and human rights organizations. Argentina went further than the mere repeal of its insult law. It adopted the actual malice standard found in United States libel.⁷² The *New York Times* standard revolutionized American libel law.⁷³ It set a standard of behavior for plaintiffs in the case of possible defamation suits where public officials are involved.

The impact of *New York Times* has yet to be realized in Latin America. The Colombian Constitutional Court has sustained the following regarding criticizing public officials:

Nevertheless, if the criticism – at times derogatory or insulting – of persons in public life, the amount of protection of the honor and

69. See Horacio Verbitsky, *Restricting News Through Insult Laws*, 105th World Press Freedom Committee (2000).

70. See Inter-Am. C.H.R., Report on the Compatibility of Contempt (Insult Laws) Laws and the American Convention on Human Rights, at 210-23, OEA/ser L/V/II.88, doc. 9 rev. (1995).

71. Law 24,198, published June 3, 1993, repealed the criminal insult law embodied in Article 244 of the Argentine Penal Code.

72. See ADOLFO ROBERTO VÁSQUEZ, *LIBERTAD DE PRENSA* 94-96 (1998). The author, a current justice of the Argentina Supreme Court, documents the cases that have adopted the actual malice standard of the *New York Times v. Sullivan*, 376 U.S. 254 (1964). Vásquez states that under Morales Solá, Joaquín Miguel s/injurias and Ramos, Juan José c/LR3 Radio Belgrano y otros the actual malice standard was embraced under the majority votes.

73. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). The *New York Times* Court required that, in order to succeed in an action for defamation, a public official-plaintiff must plead and prove, "that the statement was made with 'actual malice' - that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 280. Because *New York Times* places this burden on the plaintiff, greater public scrutiny is allowed.

good name is lessened when there is a relevant public interest and a greater degree of tolerance can be demanded of said persons in the interests of public political debate. Any person who enters public life and thus voluntarily exposes himself to social judgment thereby abandons part of the constitutionally protected private sphere.⁷⁴

It is evident that public officials must become more tolerant and should be subject to greater public scrutiny though it is still unclear as to what extent such scrutiny can reach. Latin American legal scholars must develop more legal doctrine on this point. There are far too many politicians utilizing either the criminal libel provisions or insult laws against journalists who criticize them.

Regrettably, not all countries seem to be advancing at the same pace as the Colombian Supreme Court. Recently, Jamaican legislators introduced an anti-corruption bill that would punish the press with jail time for revealing any crucial information relative to an ongoing corruption investigation of public officials.⁷⁵ Legislators must carefully examine the guidelines of such anti-corruption legislation to avoid obstructing investigative reporting.

IV. LICENSING AND PRIVACY

A. *Licensing*

There are eight countries that have established licensing requirements for journalists: Bolivia,⁷⁶ Brazil,⁷⁷ Chile⁷⁸ Ecuador,⁷⁹ Haiti,⁸⁰

74. Colom. Const. Ct. J. 80 (Feb. 26, 1993).

75. See Corruption Prevention Act of 1999 (Jam.). Under the Corruption Prevention Act, specifically under section 6(2) and 6(3), a person is guilty of an offense if the person reveals to another any document or information related to an investigation into corruption, if the person should know or have a reason to know that the information is related to an investigation of corruption. A violator can be subject to fines and incarceration up to three years.

76. See Press Law of 1925, art. 27 (Bol.); Law 495, art.1-2 (Dec. 29, 1979) (Bol.). See also Press Law of 1925, art. 27 (Bol.). Both statutes make it mandatory for journalists to be licensed in order to work professionally.

77. Prior registration is required in order to work as a journalist under terms of Decree Law 972 of 1969 and Decree 83,284 of 1979 (Braz.). Article 4 of Decree Law 972 and Article 4 of Decree 83,284 set out the documentation that must be submitted to the Labor and Social Security Ministry in order to practice journalism. Among these requirements is having a university degree or its equivalent years of experience.

78. Law 19.733 of 2001, Art. 5 (Chile) (requires a university degree to be a professional journalist).

79. See Journalists' Professional Practice Law of 1975 (Ecuador). The membership requirement requirements for a provincial guild are non-obligatory. However, the requirement for someone with a journalism degree to work as a journalist under the same law indicates that membership is an essential prerequisite, therefore, without a guild membership, one cannot practice as a journalist. Similarly, the membership requirement appear to be obligatory only for the public sector.

80. Under terms of the Haitian Press Law of 1986, a license is required to be a professional journalist. To obtain one, an applicant must have a university degree or its equivalent. A foreign

Honduras,⁸¹ Nicaragua,⁸² and Venezuela.⁸³ Without either a university degree, a number of years of practical experience, or belonging to a professional guild, journalists are not permitted to work as such professionally. The licensing of journalists became an issue of controversy in 1983, when the Supreme Court of Justice of Costa Rica imposed a three-month sentence on Stephen Schmidt, a reporter for the *Tico Times*, for practicing journalism without belonging to the Costa Rican journalist guild.⁸⁴ Later in 1985, the Costa Rica government consulted the Inter American Court of Human Rights regarding the local law mandating such association and Costa Rica's rights and duties in light of the American Convention of Human Rights. The resulting opinion stated that mandatory licensing was incompatible with Article 13 of the American Convention of Human Rights which guarantees freedom of expression.⁸⁵

journalist wishing to practice his profession in Haiti must send an application to the Ministry of Information and Coordination, and upon presentation of his journalist card, he will receive an accreditation card valid for the duration of his stay in the country. *Id.* art. 9. Only persons holding a professional identification card may avail themselves of the title of journalist. *Id.* art. 10.

81. See Organic Law of the Guild of Journalists (Hond.). It is mandatory for journalists to belong to the Guild of Journalists. The Organic Law of the Guild states:

The Guild of Journalists of Honduras is hereby created as a corporate entity and with its own patrimony, and whose organization and operation shall be ruled by the Law of Obligatory Professional Association, by this Law, its regulations, and the provisions of all other applicable laws. The legal domicile of the Guild of Journalists shall be the capital of the Republic.

82. See Law of the Professional Guild of Journalists (Dec. 13, 2000) (Nicar.).

83. Law for Practicing Journalism of 1994 (Venez.). Article 2 requires that a candidate wishing to work as a journalist must have a degree in journalism, communications or equivalent, conferred in the country by a university, or a degree legally revalidated; the candidate must also be a member of the National Society of Journalists and the Social Security Institute for Journalists.

84. See Advisory Opinion OC-5/85, Inter-Am. C.H.R. (Nov. 13, 1985). Oddly, Schmidt's case was taken before the Inter-American Commission on Human Rights to investigate the violation of his freedom of expression. The Commission found there was no violation of his right under the American Convention of Human Rights. *Id.* Under Costa Rican Law 4420 of 1969, Organic Law of the Association of Journalists (English language translation of *colegio* has been guild), Stephen Schmidt was indicted and convicted for practicing journalism without membership to the local guild. See Advisory Opinion OC-5/85, Inter-Am. C.H.R. (Nov. 13, 1985) (compulsory membership in an association prescribed by law for the practice of journalism); see also AMERICAN CONVENTION OF HUMAN RIGHTS art. 13, 29.

85. See Advisory Opinion OC-5/85 Inter-Am. C.H.R. (Nov. 13, 1985). The court stated:

It follows from what has been said that a law licensing journalist, which does not allow those who are not members of the [guild] to university graduates who have specialized in certain fields, is not compatible with the [American Convention on Human Rights]. Such a law would contain restrictions to freedom of expression that are not authorized by Article 13(2) of the Convention and would consequently be in violation not only of the right of each individual to seek and impart information and ideas through any means of his choice, but also the right of the public at large to receive information without any interference.

Id.

In a concurring opinion, Justice Piza Escalante wrote, "Freedom of expression is a basic right that every individual possesses by the simple fact of his existence, whose exercise cannot be

In the aftermath of the Inter-American Court of Human Rights' opinion, several countries have taken measures to repeal mandated associations of journalists. First, the Supreme Court of the Dominican Republic in a 1989 ruling overturned Law 148 of 1983, which had created the Dominican Journalists Guild.⁸⁶ In so doing, the court eliminated the requirement of obligatory membership. Second, the Costa Rican Supreme Court in May of 1995 decided to repeal the 1969 law requiring the obligatory licensing of all journalists wishing to work in the country. In 1998, the Colombian Constitutional Court declared unconstitutional Law 51 of 1975 which required that journalists have a university degree to qualify for professional license.⁸⁷ Finally, the Panama government signed a law that repealed Law 68 of 1978 mandating the licensing of journalists in December of 1999, even though the licensing requirement had never been enforced.⁸⁸

Mandatory licensing continues to be a heated topic for human rights advocates around the Western hemisphere. Some legislators, however continue to include provisions requiring licensing or membership requirements for journalists into legislation.⁸⁹ Such legislation is a step backwards for freedom of the press in the Americas. The Nicaragua legislative assembly recently passed a law mandating association membership for journalists in the country. The same occurred in Chile with passage of Law 19.733 of 2001 that mandates licensing of journalists. Notwithstanding, mandatory licensing or obligatory association does not seem to weigh heavily as a restriction in Latin America or Haiti for two reasons. First, most of these laws are not enforced. Second, only a handful of countries have such restrictions on the books.

B. *Privacy*

Legislators must reevaluate the current legal scheme of privacy that seems to be so punitive and repressive. Most privacy laws are contained in the criminal law of most Latin American countries. Privacy is

restricted nor conditional to the fulfillment of previous requirements of any nature that he cannot or does not wish to fulfill." *Id.* Therefore, the requirement of prior registration with a ministry or a university degree in order to work as a journalist is incompatible with the guarantee enshrined in the 1969 American Convention on Human Rights because it amounts to a restriction on freedom of expression.

86. See LANAO, *supra* note 2.

87. See Colom. Const. Ct. J. C-087/98 (Mar. 18, 1998) (declaring unconstitutional Law 51 of 1975).

88. See the country by country reports by the INTER AMERICAN PRESS ASSOCIATION, PRESS FREEDOM IN THE AMERICAS, 2000 ANNUAL REPORT 168 (2000) [hereinafter IAPA, ANNUAL REPORT 2000].

89. See the current legislative bill No. 160-32 (Aug. 11, 2000) presented to the Chilean House of Representatives. In particular, Article 5 mandates that all journalists must have a university degree in order to practice their profession.

becoming the cause of more and more litigation for the media and poses greater concern for publishers because of the risk of being criminally liable for invading someone's privacy. The public largely supports efforts to impose such legal constraints on the media to protect their privacy. The privacy schemes provide offenses ranging from divulging private facts to the public, publishing private communications, and interfering with a person's intimate life.⁹⁰ In the last four years, Panama and Paraguay have enacted Penal Codes which have included new criminal law provisions punishing the violations of privacy. Curiously the word "privacy" does not exist in the Spanish language dictionary approved by the Real Academy of the Spanish Language.

V. RIGHT OF REPLY, ACCESS TO PUBLIC RECORDS AND OTHER RESTRICTIONS.

One of the major legal hurdles in the Western Hemisphere is the right of reply law.⁹¹ The right of reply is conceived as a remedy for those who may have been aggrieved by the publication of inaccurate information. The injured party has the right to reply in the same medium and sometimes under the same conditions of length and page or section of that of the original publication. In some countries the right of reply is enormously costly. Right of reply requires the media to choose between fines, incarceration for contempt, or simply enduring costly publications.⁹² The forced publication in a news medium through the

90. See LANAQ, *supra* note 2.

91. See AMERICAN CONVENTION OF HUMAN RIGHTS art. 14 (1) ("anyone injured by inaccurate or offensive statements or ideas disseminated to the public in general by a legally regulated medium of communication has the right to reply. . .").

92. Note that in most countries, rights of reply are mandatory with no exceptions. Judges may impose anything from fines to jail time for those who do not comply with the forced publication orders. In the recent past, Argentina has imposed the right of reply on the media through application of the right of reply as set forth in the American Convention of Human Rights article 14 (1). See, e.g., Press Law, art. 29-36 (Braz.) (gives judges the authority to order that the reply be made personally by the offended party on the radio and not by the news company or journalist); *id.* art. 68 (publication of the court ruling in the case of offenses against good name, at the request of the plaintiff); Press Law of 2001 (Chile) (imposes an obligation to publish the text of a clarification or correction in full as provided by the affected person); Decree No. 2591 of 1991 (Colom.) (the media may be forced to publish the response within a short time); Press Law of 1944 (Colom.) (mandated right of reply); COSTA RICA CONST. art. 29 (right to reply); Press Law of 1962, art. 19 (Dom. Rep.) (sets fines for non-compliance with the right of reply and provides for recourse by the plaintiff); ECUADOR CONST. art. 23, ¶ 9 (provides for a right of obligatory rectification, which due to its mandatory nature is tantamount to a right of reply); EL SAL. CONST. art. 6 (right of reply); Press Law of 1980, art. 6 A-D (El Sal.) (as amended) (publishers must within three days of receipt insert the reply from any person offended by a report and must publish the reply in full); GUAT. CONST. art. 35 (offended persons have a right to have their reply be published); Press Law, art. 37-47 (Guat.) (regulates everything concerning the rights to clarification and rectification); *id.* art. 77 (requiring publication of information, when an ethics tribunal finds criticism of a public official to have been unfounded and the tribunal's ruling is

right of reply or retraction is common in Latin American countries. The right to reply exists in almost all of the countries except for Canada, United States, Jamaica, Nicaragua, and Puerto Rico. In Argentina and Costa Rica, the right of reply is enforced under Article 14 of the American Convention on Human Rights, which has become part of the domestic law in those countries.

While the right of reply poses enormous costs for the publisher, the cost for society as a whole may be too steep a price to pay. For example, the United States Supreme Court concluded in a 1974 decision regarding a right of reply for political candidates that the Florida right of access statute interfered with editorial control and judgment and may lead to editors abstaining from commenting on matters that are of general interest to the public.⁹³

On the other hand, only three Latin American countries offer somewhat adequate legal and procedural guarantees of access to official and public information. The most common ways to obtain official information are the right to petition, the laws of access, and habeas data. Habeas data, however, is generally not available to the press because it is an individualized and personal right available only to the interested parties.⁹⁴ In sum, neither individuals nor the press can access public information adequately and effectively.

ordered to be published in full in the new medium concerned); *id.* art. 22 (radio and television news programs are required to broadcast clarifications, explanations or corrections sent to them as a result of inaccuracies, imputations, or charges); Press Law of 1986, art. 19 (Haiti) (obligatory for news media to grant right of reply when an offended party requests publication or broadcast of his reply, with non-compliance within seventy-two hours being punishable by closure of the news medium or suspension of distribution); Press Law of 1958, art. 32 (Hond.) ("All persons and companies have the right to defend themselves honorably against the imputation of charges and criticism carried out by the press in order to clarify the facts imputed to them"); *id.* art. 35 ("The written or spoken medium that, without justified cause, refuses to publish the reply or defense of the claimant, or that delays its publication for more than three days, shall incur a fine of one hundred to five hundred Lempiras"); *id.* art. 37 ("The text of the defense or reply shall be published on the same page used in the publication that originated the defense"); Press Law of 1917, art. 27 (Mex.) (right of reply granted to the print media is forced publication; non-compliance is punishable with one to nine months in jail); Law No. 11 of 1978, art. 11 (Pan.) (provides for a right of clarification or rectification that, in fact, is a right of reply); PARA. CONST. art. 28 (right of rectification or clarification requires a correction or clarification to be carried by the same medium and with the same specifications that ran the original information); Decree No. 1262 of 1987, art. 4 (Para.) (right of rectification or reply is obligatory, and a court may order the reply or rectification); Decree 26,775 of 1997, art. 2 (Peru) (states that every person must exercise the right of correction within thirty days following the publication); Press Law, art. 7-17 (Uru.) (right of reply); Press Law of 1994, art. 1 (Venez.) (establishes the obligation to correct promptly and effectively all distortions or falsehoods in the news).

93. *Miami Herald Publ'g Co. v. Pat Tornillo*, 418 U.S. 241 (1974).

94. See LANAÓ, *supra* note 2. Costa Rica, Ecuador, and Colombia have better mechanisms to access public information. In reality, no Latin American legislation has a freedom of information act or a public records law per se.

VI. ELECTORAL BANS

Electoral bans are frequent in Latin America and often result in criminal liability for those who do not comply with the law.⁹⁵ Countries have enacted electoral bans under the rationale that the media improperly influences the voters during the days prior to the election. The Court rejected the argument that voters are unduly influenced by opinion polls, and therefore the infringement on freedom of expression could not be justified.⁹⁶

The issue of electoral bans is not easily resolved. Some scholars believe that democracy and the media are intimately linked, particularly during elections, because they view that the media can, in fact, influence voters. In contrast, others believe that the people have the fundamental right to know, and by restricting political coverage, the government is gravely affecting such right. Whichever point of view one embraces, it is largely evident that where the electoral ban exists, political debate through propaganda is restrained.

VIII. CONCLUSIONS

As stated before, there are commonalities in the legal systems among Latin American countries regarding the press. These include criminal libel, prior restraints and prohibited publications on a vast number of subjects, insult laws, judicial bans on press freedom, secrecy of criminal court records, an absence of public records laws, and electoral bans. There are other restrictions that escape the present analysis, such as the lack of shield laws or ethical considerations. Although most of the countries in the Western hemisphere are now democracies, a great departure from the seventies and eighties, most of them have maintained

95. See LANAO, *supra* note 2. See also Electoral Law of 1997, art. 45 (Braz.) (bans during election campaigns (from July 1, 1997 onwards) on the dissemination of favorable or non-favorable commentary on political candidates on radio broadcast or the presentation of propaganda); Law No. 18,700 of May 6, 1988, art. 30 (Chile) (electoral propaganda conducted through the print medium, radio or television is banned three days before an election or plebiscite); Electoral Law, art. 230 (El Sal.) (political propaganda is banned in the media within the three days prior to election day on the election day itself); Electoral Law, art. 74 (Hond.) ("As of five days before the elections, the political organization may only use radio or television broadcasting, newspapers and other media to explain their platforms or to speak about their candidates; they may not criticize the opposing platforms, nor the candidates. All public demonstrations or rallies within the time specified above and all political propaganda are forbidden the day of the elections."); CÓDIGO C.P.D.F. art. 403 (Mex.) (prohibiting the disclosure results of opinion polls during election period); ELECTORAL CODE, art. 178 (Pan.) (dissemination of opinion polls in the ten days before elections, is a criminal offense); Law 834 of 1996 (Para.) (prohibits the dissemination of electoral propaganda in the two days prior to elections and sets severe criminal penalties); Law No. 6019 of 1989 (Uru.) (ban on political propaganda forty-eight hours before elections).

96. See IAPA, ANNUAL REPORT 2000, *supra* note 88 at 33.

or instituted press laws that prohibit reporting on a whole array of subjects ranging from the internal activity and operations of government to the private lives of their leaders. While some of these limitations on the press may be well justified to protect national security or public order, they all undermine self-governance. A press that is free to investigate and criticize the government is absolutely essential in a nation that practices self-government and an educated and enlightened citizenry. "Self-governance" is a concept that should be the goal of any democracy, because this term implies the ability of a citizenry to make its own decisions. To achieve this goal, societies require hard information. For these reasons, we cherish the right to know.

As enshrined in Article 13 of the American Convention of Human Rights: "Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice."⁹⁷ Similarly, the importance of self-governance with respect to governance itself, is demonstrated by Thomas Jefferson's view of the press:

The basis of our governments being the opinion of the people, the very first object should be to keep that right; and were it left to me to decide whether we should have a government without newspapers or newspapers without a government, I should not hesitate a moment to prefer the latter. But I should mean that every man should receive those papers and be capable of reading them.⁹⁸

Jefferson's statement has great validity today in our hemisphere where illiteracy rates are still high. The media should be able to freely report on matters of general interest, and in particular, political matters.

One way such freedom can be achieved is by eliminating the insult law provisions that shield government officials from criticism, decriminalize libel, and develop civil law remedies for violations that are now currently governed by criminal law such as privacy.

One cannot advocate the complete decriminalization of speech. There are, however, still respectable arguments for maintaining criminal law provisions that would punish the dissemination of information. Similarly, not all speech can be protected.⁹⁹ Certainly, one cannot be an

97. Please take note that the United States signed the American Convention of Human Rights in June of 1977. The treaty has not been internally ratified by Congress. See Organization of American States, *Basic Documents Pertaining to Human Rights in the Inter-American System*, (1998).

98. Letter from Thomas Jefferson, to Edward Carrington (Jan. 16, 1787), available at <http://www.Kvroshin.org/comments/2001/7/23/23214/3438/18>.

99. See *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (words that are likely to incite imminent lawless action are unprotected); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) (words that are offensive are unprotected).

absolutist for complete free speech. Many of the laws already mentioned, however, should be eliminated or possibly treated as a tort under the civil law concept of extra-contractual liability.¹⁰⁰ The latter proposal might be a more feasible solution than attempting to incorporate schemes from the United States into Latin American legal schemes.

Ideally, Latin American scholars should develop civil law guidelines for libel such as those present in the United States for the protection of privacy and harm to reputation or image.¹⁰¹ It is a disturbing trend to think that Latin American legislators see it fit to criminally punish the violations of privacy as a general rule.

If a coherent set of rules providing for the civil treatment of violations or abuses against privacy were adopted, the media would not be as restrained or intimidated as under the current criminal legislation. Public records laws, an effective system of registry of information and a judicial process that can provide support in cases of denials are urgently required in Latin America. The lack of such systems not only affects the people's right to know but also considerably restrains investigative reporting.

In the area of press freedom, much work needs to be done with the judges to broaden their perspectives and understanding of the roles of the media, government officials, and civil society. Attorneys also need to become more aware of alternative methods of protecting speech and other fundamental rights such as honor and one's own image. Some members of the legal community seem to become apprehensive when discussing concepts such as open, uninhibited, and robust speech or when the possibility of eliminating criminal libel is suggested. It is inevitable to conclude that Latin America does not embrace the same democratic tradition or vision of the role of the press that other Western democracies do. In fact, some legislators seem committed to regulating the press and continue drafting bills that include dubious terms that seem to have the word "censorship" lurking behind them. Despite the efforts of these legislators, terms such as the "right to accurate information" and the "social duty or responsibility of the media" are creeping into several

100. Extra-contractual liability is a theory developed in early Roman Law that defined the basic premise of he who causes damages is liable. It is a fundamental notion in civil law for civil reparation.

101. See RESTATEMENT (2d) OF TORTS § 652A-652D (1977). The classification of invasion of privacy into four separate torts is generally credited to Dean Prosser. See William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 389 (1960). See also SACK, *supra* note 58, at 12-2 (describing the four torts of invasion of privacy). As noted by Sack, two torts are closely related to defamation: publicity placing a person in a false light, and publication of truthful but embarrassing private facts. The other two are less related to defamation. Truth or publication has little bearing on the torts. They are intrusion upon seclusion, which is more related to trespass.

new constitutions.¹⁰²

Perhaps, the need to develop a standard of review to protect freedom of expression is required. Constitutionally, few countries in the hemisphere have a standard of constitutional protection that places the burden on the government to justify regulation of the content of information. For example, in the United States issues relating to First Amendment law require the government to make a showing of the compelling governmental interest justifying the regulation and that the measure drawn as narrowly as possible to achieve that objective. In contrast, Latin American judges are not compelled to undertake any type of judicial scrutiny to determine whether the regulation is unconstitutional.

Notwithstanding the democratic traditions of many Latin American countries, many lack the understanding of the importance of deregulating the press and the exercise of journalism. On the other hand, it may be the general public's distrust of the press which provides support for legislation protecting privacy. The wide gamut of prior restraints and prohibited publications that were enumerated in this paper is outdated and the legal system in this field requires a complete overhaul to effectively deal with these issues. Rules, theories, and guidelines must be devised in areas of privacy and, in general, censorship. It is not clear as to how to go about creating such a legal scheme but certainly criminal law sanctions is not the answer. Let us remember what Justice Benjamin Cardozo said in *Palko v. Connecticut*, "This is true, for illustration, of freedom of thought, and of speech. Of that freedom one may say that it is the matrix, the indispensable condition, of nearly every other form of freedom."¹⁰³

102. COLOM. CONST. art. 20; ECUADOR CONST. art. 81 (1998); HAITI CONST. art. 28.2 (the duty of journalists to determine the veracity of the information); NICARA. CONST. art. 66; PARA. CONST. art. 28; VENEZ. CONST. art. 57 (referring to the duty of contributing to the formation of the citizenry).

103. *Palko v. Connecticut*, 302 U.S. 319, 326-27 (1937).